IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2007

CORAM

THE HONOURABLE MRS.JUSTICE PRABHA SRIDEVAN

Second Appeal No.2171 of 2004

Balusamy (died)
1. Chinna Ammal
2. Jayaseeli Rajaratnam
3. Nirmal Mary @ Selvi Nimmi
4. Gerald
5. Grasi Siamala @ Jayamala
   5th appellant minor rep.by mother
   and next friend, 2nd appellant . Appellants(Defendants 5 to9)

-Vs-

1. A.Kuppusami Naicker

2. The District Collector
   Chengai Anna District
   Kancheepuram

3. The Tahsildar, Chingleput . Respondents(Plaintiff & Defendants 1 and 2)

Second Appeal filed against the judgment and decree made in A.S.No.20 of 2000 dated 6.4.2004 on the file of the I Additional District Judge (Fast Track Court No.I), Chingleput on appeal from the judgment and decree made in O.S.No.208 of 1991 dated 25.07.2000 on the file of the District Munsif, Chingleput.

For Appellants :: Mr.N.Rajan

For Respondents :: Mr.V.Girish Kumar for R1
Mr.P.Muthukumar, Govt.Advocate
for RR2 and 3

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JUDGMENT

A plea of part-performance is raised for the first time in Second Appeal, when there are no pleadings to that effect, nor evidence and the appellants want to assert a right over 3.30 acres of valuable land having paid just Rs.4,000/-.

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2. The defendants are the appellants. The first respondent filed O.S.No.208 of 1991 for declaration and recovery of possession from the third defendant. The third defendant expired pending the suit. His wife and children were brought on record and are the appellants in the present second appeal. The fifth appellant has since attained majority and the learned counsel for the appellant undertakes to file vakalat for her.

3. The plaint averments are as follows:

The suit property originally belonged to one Chinna Kannammal. The plaintiff purchased the property from the successors-in-interest of Chinna Kannammal and has been in possession. There was an agreement with the third defendant on 28.4.1983 agreeing to purchase the property for a sum of Rs.7,920/-, after paying an advance of Rs.4000/-. When the plaintiff asked him to pay the balance, the third defendant refused to pay and asked for return of the advance. Since the contract was breached, this advance was forfeited. Thereafter, the third defendant has entered the suit land by force and has been in unlawful possession from 23.09.1983. The suit property was classified as Tharisu poramboke without notice to the first respondent and therefore, the plaintiff issued a notice to respondents 2 and 3 to restore the suit land under its original patta and the suit was filed for declaration of the plaintiff's title and recovery of possession from the third defendant.

4. The second defendant filed a written statement in which the knowledge about the agreement between the plaintiff and the third defendant was denied. According to the second defendant, the suit property was a dry assessed waste. It was also denied that the reclassification was done without notice to the plaintiff.

5. The fourth defendant, the third defendant's father filed a written statement denying the plaintiff's right. The sixth defendant, who is the wife of the third defendant filed a written statement on behalf of the other legal representatives. She admitted that there was an agreement but contended that the plaintiff had misrepresented that the suit property was punjai land and that the third defendant verified with the revenue records and found out that it was Punjai Tharisu. and had also planted Eucalyptus and Casuarina trees, in his own right. It was also alleged that the suit was barred by limitation. The trial court decreed the suit as prayed for and the Appellate Court confirmed the judgment.

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6. The second appeal was admitted on the following questions of law:

> "1. Whether the appellants are entitled to be in possession of the suit property though their limitation for instituting the suit for specific performance has already expired?
>
> 2. Whether the Courts below were correct in holding that the suit property is a tharisu land?"

7. Learned counsel for the appellants admitted that the appellants are not denying the title of the first respondent, but the appellants are entitled to be in possession and to invoke the provisions of Section 53 A of the Transfer of Property Act as a shield to protect their possession. Learned counsel submitted that the first respondent had come to Court with a case that there was forceful and illegal dispossession in 1983 and having failed to prove the same, it is not open to him to take possession from the appellants. Learned counsel submitted that this is not a case where possession should follow title, in view of the peculiar circumstances where both the sides admit the existence of an agreement. According to the learned counsel, once an agreement is admitted, the presumption is, the possession of the appellants is legal until the contrary is proved. Learned counsel submitted that huge improvements have been made in the property and therefore, the equity between the parties should also be balanced by this Court.

8. Next, learned counsel submitted that when it is the plaintiff's case that there was illegal dispossession in 1983, it is difficult to believe that he would have kept quiet for 7 long years without filing the suit and the fact that he has kept quiet would only show that he has acquiesced in the possession of the appellant and also to the improvements made on the suit property. Learned counsel submitted that even though possession in part performance of the agreement has not been specifically pleaded, the attendant circumstances should be taken note of by this Court to do justice to the parties. But this plea of acquiescence is raised for the first time here and cannot be looked into.

9. Learned counsel relied on the following judgments:

> AIR 1968 Andhra Pradesh 190 (T.Venkata Subrahmanayam vs. V.Viswanatharaju and another) wherein it was held that:

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"The mere fact that the notice gave a certain time to perform the contract would not necessarily lead to the conclusion that the time prescribed was the essence of the contract. In all such cases, the Court has to look to the pith and substance of the notice and not at the letter of the notice and decide as to whether time was or was not essential to the subsistence of the contract. The real intention of the party who gives notice must be clear from the notice itself."

..... According to Section 55 of the Contract Act, it is no doubt true that in case the first defendant makes time the essence of contract and if the contract is not performed by the other side, the contract becomes voidable. It must however be remembered that the only right which the first defendant gets in such a case is to avoid the contract. The contract does not automatically get determined. He has to further expressly or in unambiguous words determine the contract under S.64 of the Contract Act. It is not in dispute that subsequent to Exhibit A-5, the first defendant did not issue any notice cancelling the contract. His previous as well as subsequent conduct brings out prominently the fact that he had never any intention to make time the essence of contract. The irresistible conclusion therefore is that Exhibit A-5 neither makes time the essence of contract nor does it conditionally or otherwise put an end to the contract. The assertion that he will sell the property to others need not necessarily in all cases mean that he wanted to put an end to the contract."

Learned counsel submitted, therefore, if the plaintiff wanted possession, he ought to have issued notice. He should have been willing to part with the advance that he had derived from the agreement, viz., a receipt of Rs.4000/-. He cannot take the benefit under the agreement and also take possession from the appellants who are in legal possession.

10. Next learned counsel relied on the judgment reported in AIR 2004 Supreme Court 3854 (Mahadeva and Others vs. Tanabai).

"8. The judgment of the High court is based on a question framed during the course of writing of the judgment which is in departure from the two questions of law on which the appeal was admitted for hearing. The whole emphasis shifted from the core issues. Then the High Court has not discussed any law and has also not assigned reason, much less a satisfactory one for taking

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a view different from the one concurrently taken by the two Courts below. The singular reason assigned by the High Court for denying the benefit of Section 53-A of the T.P.Act is not a sound reason by itself in view of the decision of this Court in Shrimant Shamrao Suryavanshi and another v. Pralhad Bhairoba Suryavanshi (dead) by L.Rs and others (2002) 3 SCC 676. This Court has held that merely because the suit for specific performance at the instance of the vendee has become barred by limitation that by itself is not enough to deny the benefit of the plea of part performance of agreement of sale to the person in possession."

Based on this the learned counsel wanted the appellant's possession to be protected.

Learned counsel also relied on AIR 1971 Madras 466 (Periasami Naicker vs. Sella Pillai).

"In order to make Section 53-A applicable, the defendant must establish some overt act in part performance of the contract of sale. Mere payment of sale consideration is not enough. Change in the possession of land from the vendor to the vendee is an act of part performance, both of the person who gives and of the person who takes possession. It is therefore, contended that unless it is established that the defendant was put in possession of the property in pursuance of the contract of sale, Section 53-A is inapplicable. In Morphett v. Jones (1818) 36 ER 344 at page 348, Sir Thomas Plumar M.R. said that -

"The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an enquiry into the terms: the Court regarding what has been done as a consequence of contract or tenure".

In Broughton v. Snook, 1938-1 All ER 411, it was held by Farwell, J., that the expenditure on alterations and decorations was an act which was in the circumstances of the case referable only to the contract. In the present case, the appellate court has held that the defendant has been in possession of the property in pursuance of the contract of sale and that finding is supported by materials on record. The evidence of D.W.3 which has

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been accepted by the appellate court clearly shows that the defendant was put in possession in pursuance of the contract and 10 or 15 days thereafter the suit house was constructed."

According to the learned counsel, the possession of the appellants proves that there was part performance.

In AIR 2004 Madras 450 (S.Ponnuthai vs. P.Muthusamy), it is held as follows:

"The decisions referred to on behalf of the respondent will not help. In fact, those decisions would go against the respondent because one of the conditions to be satisfied is proof of possession. Normally, the findings of fact in suits for bare injunction are not interfered with in second appeal. But, in this case, it is apparent that even the pleadings do not make out proof of possession or proof of interference with possession, so the suit must fail. The Lower Appellate Court holds that no document has been produced to show that Exs.A1 to A3 have been cancelled and unless and until they are cancelled, the respondent's possession cannot be disturbed. The averments in the plaint have been lost sight of, wherein the respondent admits the revocation of Ex.A.3 and that "Another telegram addressed to the plaintiff's wife by the defendant's counsel wherein it is mentioned that the agreement dated 7.5.1989 is lapsed...." The Lower Appellate court has concluded that since Ex.C1, the Commissioner's Report (appointed pending appeal), speaks of foundation work in 9 out of 10 pits, the respondent must have taken possession of . This conclusion is erroneous. The pillars found in the property in the year 1996 are not proof of possession on the date of the suit (20.08.1992). The categorical admission by the respondent that he was not put in possession on the date of Exs.A1 to A3 was ignored. The effect of the continuance of the possession of the appellant at least with regard to 350 sq.ft. was ignored. The total absence in the oral evidence with regard to threat or interference was also ignored. Conclusions not based on pleadings or legal evidence cannot be confirmed."

According to the learned counsel without any proof, the plea of illegal dispossession cannot be accepted.

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11. Learned counsel appearing for the respondent submitted that there is no denial of title and therefore, possession should follow. While the case of the plaintiff that there was illegal dispossession must be accepted and in any event, the appellants are not entitled to invoke Section 53-A since the sine qua non for invoking the same is to show that the appellants were ready and willing to perform their part of the agreement. There are materials on record to show that the third defendant was not willing to perform his part of the agreement so the appellants are not entitled to Section 53-A protection.

12. The suit property is an extent of 3.30 acres in Paloor village, Chingleput Taluk. The third defendant was an Advocate. There appears to have been an agreement, which agreement has not been produced into Court, under which a mere sum of Rs.4,000/- has been paid. For Rs.4,000/- , the appellants claim right over 3.30 acres of valuable land.

13. Learned counsel for the appellant repeatedly urged that injustice would be done if this Court does not take note of the circumstances under which the appellant had come into possession, which is pursuant to the agreement and to protect the possession.

14. Section 53 A of the Transfer of Property Act reads as follows:

> "Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of that contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of

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the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

15. The circumstances under which the possession of the person invoking Section 53-A should be protected shall be established by pleadings and proved by acceptable evidence. It is not possible to look at any circumstance or to come to the conclusion that the appellants are in possession, in part performance of an agreement, without there being pleadings to that effect.

16. Learned counsel for the appellant submitted that the original agreement holder was the third defendant, who died pending suit and therefore, the lacunae in the pleadings must be viewed from that perspective. I do not think that any circumstance would justify a Court of law to arrive at a conclusion for which there are no pleadings. It was repeatedly urged on behalf of the appellants that if the matter is sent back to the trial Court, evidence can be let in. It is needless to say that judgments which are rendered on the available pleadings cannot be set aside merely to afford indulgence to a litigant who has not been vigilant in producing the evidence required to support his case. In the present case, even the foundation for the substantial question of law is absent since he has not pleaded part performance.

17. In 2001 (1) CTC 559 (P.Subramanian Udayar vs. Eswari and 4 others), the learned Judge observed that a person who invokes the protection of Section 53-A should be ready and willing to perform his part of contract. The documentary evidence produced before this Court indicates otherwise. Ex.P3 was produced by the first respondent to show that the suit agreement was in the custody of the third defendant. Ex.P3 is a letter in which it is stated as follows:

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"தங்கள் நிலம் வாங்குவது குறித்து பேசவேண்டும், திங்கள் அல்லது செவ்வாய் (9.1.1973) அன்று உடன் கிளம்பி வரவும்" என்று 5.8.1983 அன்று எழுதிய கடிதம். அதேபோல் வா.சா.ஆ.4 என்பது அதே 3 ஆம் பிரதிவாதி வாதிக்கு 23.9.83 ல் "விலங்கமுள்ள நிலத்தை விற்பதில் உங்களுக்கு இலாபம் இருக்கலாம். விலங்கம் உள்ள நிலத்தை வாங்குவது எனக்கு நஉட்டம் தான். இந்த மாதம் 15 ம் தேதி

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நேரில் வந்து அக்ரிமெண்ட் பேரில் வரவேண்டிய ரூ.4,000/ திருப்பித் தருவதாக எழுதிக் கொடுத்துவிட்டு சென்றீர். இது நாள் வரையில் வரவில்லை. வில்லங்கம் இருப்பதாக தெரிந்து தான் அப்படி எழுதிக் கொடுத்தீர்"

Therefore, the deceased third defendant had informed the first respondent that it may be profitable to him to sell the property which is not free from cloud on its title but would definitely be disadvantageous to the third defendant to purchase the property and therefore, the third defendant stated that the plaintiff had agreed to refund Rs.4,000/- but, he failed to do so. Therefore, the third defendant was neither ready nor willing to perform his part of the contract since he felt that the title to the property was not free from doubt. Firstly, without pleadings the appellants cannot seek the protection of Section 53-A. Secondly, in view of Ex.P.3, even if the appellants had pleaded that they were in possession in part performance of the contract by their clear unwillingness to complete the contract, they are disentitled from invoking the protection of the section. Much was said about the non-production of the agreement. But it is the evidence of PW1 that the agreement is with the Advocate. Therefore, adverse inference should be drawn against the appellants. Even for acquiescence there is no pleading, so the submission in this regard cannot be considered. DW1 the Tahsildar has given evidence that the third defendant's possession is illegal. So, the finding of the Courts below is based on evidence and is a finding of fact. The decision reported in 1998 (1) CTC 186 (Vasantha and others vs. M.Senguttuvan) answers the questions raised here. There two suits were tried together, a suit for recovery of possession filed by the owner and suit for specific performance by the agreement holder.

> "18. Even if we accept the finding of the trial Court that the appellant has sufficient funds since he had put up construction, that will not show his willingness. "Willingness" must be to implement the contract in accordance with terms, within the stipulated period, or within a reasonable time thereafter. If he had the necessary funds,he has to explain why he did not offer or tender the balance sale consideration and get the sale deed. That was not the conduct of the appellant. In spite of putting up a construction, he was not prepared to take a sale deed. It shows that the conduct of the appellant, namely, that he was not ready and willing to perform his part of the contract. That will be sufficient to dismiss Second Appeal No.314 of 1986.

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19. That apart, a recent judgment of the Supreme Court also has to be taken into consideration while exercising the discretion. It is well settled that even if the appellant proves all the ingredients of Section, he cannot claim specific performance as of right. It is only a discretion and that discretion will have to be exercised on well established judicial principles. In this case, the discretion has been rightly exercised by the lower appellate Court, declining the relief. Unless the appellant shows that the discretion exercised by lower appellate Court is perverse in this Second Appeal that finding cannot be disturbed. Even though the Second Appeal was filed in 1986, it is now more than 11 years, when the matter is heard. The sale agreement is in the year 1978, and the property is also situated close to Madras City at Saidapet Taluk.

21. The other question that arises for consideration is whether the respondent is entitled to recover the property. Admittedly, he is the owner. The suit for specific performance also stands dismissed. The trial Court entered a finding that the appellant cannot be treated as a trespasser, ' not as a person in possession without consent of the owner. This finding of the trial Court was not accepted by the lower Appellate Court. The lower appellate Court held that the construction put up by the appellant was without authority and the owner's consent was not obtained. Once the suit for specific performance is dismissed, the only question that arises for consideration is whether the appellant is entitled to the benefit of Section 53-A of the Transfer of Property Act. Once I hold that the plaintiff was not ready and willing to take the sale deed, even if the appellant claims the benefit of Section 53-A of the said Act, that also will have to be found against him.

22. In a recent decision of the Supreme Court reported in Mohan Lal vs. Mirza Abdul Gaffar, 1996 (1) SCC 639, their Lordships considered the scope of Section 53-A of the Transfer of Property Act. Paragraph 6 of the judgment reads thus:

> "Even otherwise, in a suit for possession filed by the respondent, successor-in-interest of the transferor as a subsequent purchaser, the earlier transferee must plead and prove that he is ready and willing to perform his part of the contract so as to enable him to retain

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his possession of the immovable property held under the agreement. The High Court has pointed out that he has not expressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16(c) of Specific Relief Act, 1963, the plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The plaintiff who seeks enforcement of the agreement is enjoined to establish the same. Equally, when the transferee seeks to avail of Section 53-A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right, is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted thereunder."

All the ingredients that are essential for specific performance should be proved in a claim under Section 53-A of the Transfer of Property Act also. In fact, before the lower appellate Court, I do not find any serious arguments was put forward by the appellant under Section 53-A of the Transfer of Property Act. Ex.B1 does not say that possession was handed over to the appellant. It is also admitted that on that date, possession did not pass to the appellant. The respondent is residing far away from the plaint property and it no no man's land. It is his case that except for a shed, it is being used by any one. It was under those circumstances, appellant trespassed into the shed and let out the building to a third person thereafter. Of course the trial Court has entered a different finding. A witness was also asked to swear to a statement that the respondent's friend also attended a house-warming ceremony after a new construction was put up. But the lower appellate Court has entered a finding that the construction is unauthorised, and the appellant has exploited the absence of the respondent in the locality. This finding is based on the appreciation of facts, and it cannot be said as perverse. In second appeal, I do not think I should re-appreciate the evidence for the purpose of entering a different finding.

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23. A question arises as to what has to be done regarding the constructions. The lower appellate Court has found the constructions to be unauthorised. Naturally, appellants can only be directed to remove the same. I direct the appellants to remove the same within a period of two months from today failing which the respondent will be entitled to take possession of the property, and hie is also entitled to have the structures removed at the expense of the appellants. Second Appeal No.2101 of 1986 is also dismissed with the above directions. This Second appeal is dismissed with costs."

18. Once the plaintiff's title is declared, possession should follow unless the suit is filed beyond 12 years from the date on which the plaintiff has been dispossessed. In this case, both the parties agree that the suit agreement was in 1983, dispossession can only date from then. It has not been proved that the third defendant was put in possession. So the suit filed in 1991 is in time. Neither the third defendant nor his legal representatives can resist the plaintiff's claim for possession consequent to the declaration of the plaintiff's title. Therefore, substantial question of law No.1 is answered as against the appellants. As regards substantial question of law No.2, it is for the Government to object to the finding of the both the courts that the reclassification of the land as Tharisu was done in accordance with law and that the plaintiff is not entitled to joint patta No.25 as he claimed. The Government has not challenged the decree passed against them in the suit and therefore, it is not for the appellants to raise this as a substantial question of law.

19. For the above reasons, this second appeal is dismissed with costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The I Additional District Judge
   (Fast Track Court No.I), Chingleput

2. The District Munsif, Chingleput.

3. The Record Keeper,
VR Section, High Court, Madras.

+ 1 cc to Mr. Mr. Rajan, Advocate, SR No.41449

+ 1 cc to Mr. V. Girish Kumar, Advocate, SR No.41477

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